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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IN RE NJOY, INC. CONSUMER CLASS ACTION LITIGATION	Case No. CV 14-00428-JFW (JEMx) consolidated with SACV 14-00427-MMM (RZx) HONORABLE JOHN F. WALTER **NJOY'S RESPONSE TO PLAINTIFFS' OBJECTION TO THE DECLARATION OF DENISE MARTIN** Date: February 1, 2016 Time: 10:00 a.m. Place: Courtroom 16

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NJOY'S RESPONSE TO PLAINTIFFS' OBJECTION TO THE DECLARATION OF DENISE MARTIN

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NJOY'S RESPONSE TO PLAINTIFFS' OBJECTION TO THE DECLARATION OF DENISE MARTIN

1.   INTRODUCTION

NJOY has proffered Dr. Denise Martin as a rebuttal expert to independently analyze and evaluate the Bayesian hedonic regression proposed by Plaintiffs' expert witness, Dr. Jeffrey Harris. Plaintiffs' "Objection" to the Declaration of Denise Martin fails in several respects. First, Plaintiffs' objection is really a motion to strike, and Plaintiffs failed to comply with Local Rule 7-3, among others. Second, despite Plaintiffs' misleading attempt to distort Dr. Martin's qualifications, a review of Dr. Martin's education, training, and experience over the past 25 years demonstrates that she is vastly qualified to opine on Dr. Harris's proposed Bayesian hedonic regression. For this reason alone, the bulk of Plaintiffs' objection fails. Third, Plaintiffs fail to show that any portion of Dr. Martin's opinions, assumptions, or recitations of generally accepted principles are incorrect in any manner. Fourth, Plaintiffs' objection mischaracterizes Dr. Martin's reliance on the opinions of Dr. Van Liere, and the applicable standards relating to one expert's reliance on another expert for assumptions. Most glaringly, Plaintiffs ignore Dr. Martin's opinion that Dr. Harris's proposed Bayesian hedonic regression cannot properly estimate damages in this case, independent of Dr. Van Liere's testimony. Lastly, Plaintiffs impermissibly attempt to shift the burden for rebuttal experts.

2.   PLAINTIFFS' OBJECTION/MOTION TO STRIKE SHOULD BE OVERRULED/STRICKEN BECAUSE PLAINTIFFS FAILED TO COMPLY WITH LOCAL RULE 7-3

Local Rule 7-3 requires that "counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution." "The purpose of Local Rule 7-3 is to eliminate, or narrow the scope of, the motion and avoid unnecessary expense of the Court's time and resources." *Attalla v. Equinox Holdings, Inc.*, 2015 U.S. Dist. LEXIS 70018, at *2 (C.D. Cal. May 29, 2015) (citing *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002)). "A district

1   court has the discretion to strike a motion that fails to comply with the local rules."

2   *Id.*

3   There can be no dispute that Plaintiffs failed to meet and confer with NJOY's

4   counsel before filing their objection/motion to strike. On Friday, December 18,

5   2015, the same day that Plaintiffs filed their objections/motions to strike, Plaintiffs'

6   counsel indicated by email that they intended to file "objections" to the declarations

7   of NJOY's expert, Denise Martin. (Declaration of Paul L. Gale in Support of

8   NJOY's Response to Plaintiffs' Objections to the Declarations of Kent Van Liere

9   and Denise Martin ("Gale Decl."), ¶ 2, Ex. A.) This was the first time that

10   Plaintiffs had stated they would be filing an objection or motion to strike Dr.

11   Martin's declaration. Moreover, Plaintiffs' correspondence did not relate to any

12   meet and confer, or request a meet and confer, but instead merely asked whether

13   NJOY believed particular deposition citations were confidential. In fact, Plaintiffs

14   had no intention of meeting and conferring, as the correspondence was sent to the

15   two NJOY attorneys who were attending an out of town deposition in this case on

16   the same day. Those same attorneys had been in another deposition in this case two

17   days earlier as well, and Plaintiffs never requested any meet and confer, or provided

18   any indication that they would be filing a motion to strike against NJOY's experts.

19   (*Id.* at ¶ 2.)

20   Later that same day, but before anything was filed, NJOY's counsel

21   responded to Plaintiffs' counsel's question as follows:

22   Can you please let me know what you mean by "objection." To

23   the extent Plaintiffs are seeking to exclude Dr. Martin, or the

24   opinions of Dr. Martin, any such "objection" is effectively a

25   motion to strike/Daubert motion. Pursuant to Local Rule 7-3,

26   Plaintiffs were required to meet and confer prior to the bringing the

27   motion. Plaintiffs have never conducted such a conference, and

28   the time to conduct such a conference passed last week. Moreover,

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1   Plaintiffs insisted that NJOY conduct such a meeting prior to

2   bringing its motion to strike Dr. Harris.

3 (*Id.*, Ex. B.) Plaintiffs <u>ignored</u> NJOY's email and filed their objection/motion to

4 strike without conferring with NJOY's counsel. (*Id.* at ¶ 3.)   As a result, the

5 required Local Rule 7-3 conference of counsel never took place. (*Id.*)

6   Further, Plaintiffs cannot be permitted to avoid the Local Rules by styling a

7 motion to strike as an "objection." Plaintiffs' "objection" is a *Daubert*

8 motion/motion to strike, regardless of the title affixed to it. In fact, the first

9 paragraph of the objection/motion to strike contains a recitation of the *Daubert*

10 standard, and the remainder of the objection/motion to strike focuses on Dr.

11 Martin's alleged failure to meet that standard. Notably, Plaintiffs recently asserted

12 that Local Rule 7-3 does indeed apply to *Daubert* motions, and insisted that NJOY

13 conduct a lengthy Local Rule 7-3 conference prior to filing its motion to strike the

14 opinions of Plaintiffs' expert, Dr. Jeffrey Harris. (*Id.*, Ex. C.)

15   Plaintiffs' objection/motion to strike is also procedurally improper, because

16 Plaintiffs failed to include a notice of motion, which among other items, requires a

17 concise statement of the relief or Court action the Plaintiffs seek and a statement

18 that the motion was brought following the conference of counsel pursuant to Local

19 Rule 7-3. L.R. 6-1, 7-3, 7-4.

20   The Local Rules exist for a reason. Because Plaintiffs' counsel failed to meet

21 their obligations required by the Local Rules before filing their objection/motion to

22 strike, the objection/motion to strike should be stricken. *See Attalla*, 2015 U.S.

23 Dist. LEXIS 70018, at *2 (striking a motion because counsel failed to comply with

24 Local Rule 7-3); *ABS Entm't, Inc. v. Cumulus Media, Inc.*, 2015 U.S. Dist. LEXIS

25 164551, at *2-3 (C.D. Cal. Nov. 25, 2015) (striking motion for class certification

26 for failure to comply with Local Rule 7-3).

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3.   DR. MARTIN IS AN EXPERT ON BAYESIAN HEDONIC REGRESSION AND HEDONIC REGRESSION ANALYSIS

Dr. Martin is well qualified to provide opinions regarding hedonic regression analysis and what Dr. Harris describes as a "Bayesian hedonic regression." Dr. Martin is well-versed in each aspect of a Bayesian hedonic regression, as well as the model as a whole. Hedonic regression and "Bayesian hedonic regression" are a subset of general regression analysis and rely on the same statistical techniques. (Declaration of Dr. Denise Martin in Response to Plaintiffs' Objections to the Martin Declaration ("Martin Responsive Decl."), ¶ 8.) As explained in more detail in the Martin Responsive Decl., regression analysis is a statistical tool that estimates the relationship between a dependent (or explained) variable and one or more independent (or explanatory) variables. (*Id*. at ¶ 9.) In other words, regression analysis is a statistical tool that helps to explain what effect, if any, certain independent variables (for example, the amount of time spent studying) have on an outcome (such as grades) that is the dependent variable. (*Id*.)

Hedonic regression is simply a form of such regression analysis that uses price as the dependent variable that is attempting to be explained. However, instead of using hours spent studying to explain grades, product attributes are used as independent variables in an attempt to explain price. (*Id*. at ¶ 10.) As explained in more detail in Section 4 hrerein, hedonic regression can only be applied under strict conditions where the market is stable and a company has no control over price – conditions that are not present here.

As proposed in this context, the term "Bayesian" refers to a statistical model in which the information considered in the regression analysis is supplemented with some form of outside (or "prior") information. That outside information can come from a variety of sources. Dr. Harris proposes to use the results from a proposed conjoint survey as the outside information for his hedonic regression, and he thus coins his method as a "Bayesian hedonic regression." (*Id*. at ¶ 11.)

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1   Dr. Martin earned a Ph.D. in Economics from Harvard University in 1991.

2   Dr. Martin was trained in regression analysis, including hedonic regression, as well

3   as in Bayesian methods, during her undergraduate education at Wellesley College

4   and her graduate education at Harvard University.[1] (*Id.* at ¶ 12.)

5   Dr. Martin joined NERA Economic Consulting in 1991, and has been a

6   Senior Vice President at NERA since 2001. Since joining NERA, Dr. Martin has

7   used regression analysis in hundreds of projects on which she was retained.

8   Moreover, during that time, Dr. Martin has run regressions that incorporate

9   information from outside the regression data, which are considered to be

10   "Bayesian" regressions. (*Id.* at ¶ 13.) Accordingly, it is clear that Dr. Martin is

11   well qualified to opine on hedonic regression analysis and Bayesian hedonic

12   classes.

13   The dubious nature of Plaintiffs' argument as to why Dr. Martin is not

14   qualified is made clear by the several nonsensical and irrelevant arguments

15   Plaintiffs make regarding Dr. Martin's experience. For example, Plaintiffs argue

16

17   [1] While Plaintiffs attack Dr. Martin for her testimony that she did not take

18   any courses devoted solely to hedonic regression or Bayesian hedonic regression,
    no such classes appear to exist. (Martin Responsive Decl., ¶ 12, n.19; *see also*,

19   Gale Decl., Ex. H (listing courses taught at Harvard, which does not include any

20   stand alone classes for hedonic regression or "Bayesian hedonic regression").)
    Because these methods are subsets, or applications, of broader regression analysis,

21   and because hedonic regression is only appropriate under a set of very stringent

22   conditions, the absence of entire courses devoted exclusively to these topics is not
    at all surprising. Moreover, Plaintiffs failed to put in any evidence that their expert,

23   Dr. Harris, took such stand-alone classes, or that it is necessary to have taken such

24   hypothetical stand-alone classes. Similarly, Plaintiffs also attack Dr. Martin for not
    knowing if there is a definitive text for Bayesian regression, even though they never

25   established that such a text even exists, or that the contents of the hypothetical text

26   somehow contradicts her opinions. In fact, Plaintiffs' own expert, Dr. Harris, did
    not testify regarding any definitive texts on the subject in either his declaration or

27   his deposition.

28

NJOY'S RESPONSE TO PLAINTIFFS' OBJECTION TO THE DECLARATION OF DENISE MARTIN

1 that because Dr. Martin's work has been focused more in the areas of "securities

2 litigation, product liability and mass torts valuation and labor economics," she lacks

3 expertise in consumer fraud matters and is somehow unqualified to opine in this

4 matter. (Objection to the Declaration of Expert Denise Martin ("Obj."), 4:7-22).

5 Whether Dr. Martin is, or is not, an expert in "consumer fraud cases" is irrelevant to

6 whether she is qualified to opine on Dr. Harris' proposed regression damages

7 models. In any event, many of the cases in which Dr. Martin has been retained

8 involve consumer fraud issues. (Martin Responsive Decl., ¶ 14.) In addition, while

9 Plaintiffs rely on NERA's website for their assertion that Dr. Martin has "focused

10 her work at NERA in three areas: securities litigation, product liability and mass

11 tort valuation, and labor economics," Plaintiffs fail to inform the Court that

12 NERA's website classifies "Class Actions and Class Certification" as a practice

13 consisting of antitrust, labor and employment, product liability, and securities, with

14 consumer class actions dealing with fraud and misrepresentation include as a subset

15 of product liability. Consumer class actions are considered a "focus area" for the

16 practice, and Dr. Martin is the designated practice chair at NERA for the class

17 action practice as a whole, as well as the focus area. (*Id.*)

18 　　　　Even more preposterous is Plaintiffs' reliance on the fact that Dr. Martin has

19 mostly been retained by defendants in litigation. Whether Dr. Martin is retained by

20 plaintiffs or defendants is wholly unrelated to whether she is qualified to provide

21 her opinions in this matter. Plaintiffs' position is also highly inappropriate given

22 that their expert, Dr. Harris, has only opined on behalf of plaintiffs during his

23 career. (*See* June 3, 2015 Deposition of Jeffrey Harris at 57:16-18, attached as Ex.

24 F to the Gale Decl.)

25 　　　　Plaintiffs also argue that Dr. Martin is not qualified because she estimated

26 that she has spent 10% of her time at NERA on consumer class actions. (Obj.,

27 4:16-17.) For the reasons set forth above, this argument is irrelevant to whether she

28 is qualified to opine on Dr. Harris's proposed regression models. Further,

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1   Plaintiffs' argument lacks merit for several additional reasons. First, Dr. Martin's

2   education, including her graduate level studies in regression analysis, statistics,

3   Bayesian methods, and hedonic regression, give her a basis to render the opinions

4   regarding why Dr. Harris's proposed Bayesian hedonic regression is not

5   appropriate. Second, Dr. Martin's career spans nearly 25 years, so 10% of such a

6   long career gives her substantial practical expertise in such cases. (Martin

7   Responsive Decl., ¶ 15(a).) Dr. Martin's experience includes, among other things,

8   two reports in consumer class action matters in which plaintiffs' expert proposed

9   using hedonic regression. (*Id.* at ¶ 15(b).)

10   Finally, Dr. Martin has served as a consulting and testifying expert in more

11   than 100 other class action matters (including securities class actions and

12   employment class actions), which has provided her with tremendous practical

13   experience in addressing economic questions similar to those present in this case.

14   While the contexts for these matters may have differed, the assignment in each of

15   those cases often has been the same: to estimate damages, if possible, using the

16   difference between the price paid and the price that would have been paid absent

17   certain alleged wrongdoing. For example, in dozens of securities class actions, Dr.

18   Martin has performed regression analyses to estimate the price investors would

19   have paid for a security absent any alleged misstatements or omissions by a

20   defendant, controlling for market and industry factors, which required that she first

21   analyze whether the market conditions existed for her to apply the regression

22   analysis.[2] (*Id.* at ¶ 15(c).)

23

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24   [2] *See, e.g.*, "Affidavit, in *Marvin Neil Silver and Cliff Cohen vs. IMAX*

25   *Corporation, et al.*, Ontario Superior Court of Justice, 2012"; "Rebuttal Report and
     Declaration, in the United States District Court, District of Puerto Rico, in *Samuel*

26   *Hildenbrand, et al. vs. W Holding Company, Inc., et al.*, 2012"; "Deposition and
     Reports in the United States District Court, District of New Jersey, *In Re: Schering-*

27   *Plough Corporation/ENHANCE Securities Litigation*, 2011"; and "Deposition and

28   Reports in the United States District Court, District of New Jersey, *In Re: Merck &*

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4.   PLAINTIFFS HAVE FAILED TO SHOW THAT ANY ASPECT OF DR. MARTIN'S DECLARATION IS ERRONEOUS OR UNRELIABLE

Plaintiffs' objection/motion to strike suffers from another glaring defect – Plaintiffs failed to provide any evidence to show that the opinions and generally accepted principles Dr. Martin sets forth in her declaration are incorrect. Dr. Martin has testified regarding generally accepted principals for hedonic regression, and made clear that it is generally accepted that use of hedonic regression is only appropriate when certain quite stringent conditions apply.

In particular, to be able to interpret the coefficients on the product attributes as implicit prices for those attributes, and to further conclude that the price of the product without the attribute would be the actual price less the estimated implicit price for the attribute, the analyst must have reason to assume that market is stable and that both firms (sellers) and consumers are "price takers." Firms and consumers that are price takers believe that they do not have control over price and must accept the price as set by the market. That is, firms are able to sell their product at the established market price, but would be unable to do so if they raised price and have no incentive to lower price. Price-taking consumers similarly are able to buy products at the established market price, but do not have sufficient purchasing power in the market to be able to pay less for a product than the market price. (Martin Responsive Decl., ¶ 10 n.17). If the market is not sufficiently stable or mature (e.g., if the product in question was introduced recently, so that firms are still entering and exiting and new product variations are still being introduced), market-clearing prices will be in flux so that hedonic regression cannot reliably measure the implicit price associated with any particular product attribute. (*Id.*)

_____

Co., Inc., Vytorin/Zetia Securities Litigation, 2011," all of which are included in Exhibit 1 to Martin Responsive Decl.

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1   Dr. Harris acknowledges this point in his Reply Declaration. (Harris Reply Decl.,

2   Dkt. 168, ¶ 33.) If these conditions do not hold, which they do not for the e-

3   cigarette market, then the link between the price of the product and the implicit

4   prices of the underlying product attributes is severed and hedonic regression will

5   fail and be unable to be used to measure any implicit equilibrium price of the

6   attribute. The same market conditions must hold for Bayesian hedonic regression

7   to be applied as they are for standard hedonic regression. (*Id*. at ¶ 10.)

8   Plaintiffs do not put forward any evidence, and do not dispute, these

9   generally accepted principles. Clearly, if Dr. Martin was incorrect regarding these

10 requirements, Plaintiffs could have cited to *some* authority on that point. Instead,

11 Plaintiffs fail to point to anything in Dr. Martin's declaration or testimony that is

12 incorrect, and Plaintiffs fail to put forward any evidence to rebut any of Dr.

13 Martin's opinions or her discussion of general accepted principles.

5.   HEDONIC REGRESSION AND BAYESIAN HEDONIC REGRESSION ARE SELDOM, IF EVER, USED IN CLASS ACTION LITIGATION BECAUSE OF THEIR STRICT REQUIREMENTS

17   Plaintiffs also attack Dr. Martin for not having rebutted or conducted a

18 Bayesian hedonic regression for litigation.[3] Significantly, a Lexis search for a

19 proposed damages model labeled as Bayesian hedonic regression, in all cases, state

20 and federal, yields <u>zero</u> results. (Gale Decl., ¶ 9.)[4,] Moreover, Plaintiffs have not

---

[3] Dr. Martin's experience does include submitting two reports in consumer class action matters in which plaintiffs' expert proposed using hedonic regression. (Responsive Martin Decl., ¶ 15(b).) Moreover, "[w]here a witness has considerable expertise working in a specific field, the witness's 'lack of particularized experience' in one aspect of that field, 'goes to the weight accorded her testimony, not to the admissibility of her opinion as an expert.'" *Chelan County Washington v. Bank of Am. Corp.*, 2015 U.S. Dist. LEXIS 89414, at *21 (E.D. Wa. July 9, 2015) (quoting *United States v. Garcia,* 7 F.3d 885, 889 (9th Cir. 1993)).

[4] The application of hedonic models (whether classical or Bayesian) occurs most often in the study of the real estate market, because the housing supply in the

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1   shown their expert, Dr. Harris, has ever submitted or conducted a Bayesian hedonic

2   regression for litigation previously.

3   **6.   DR. MARTIN IS NOT PROVIDING ANY OPINIONS REGARDING**

4   **THE DESIGN OR IMPLEMENTATION OF CONJOINT ANALYSIS**

5   **OR THE DIRECT METHOD, AND DOES NOT NEED TO BE AN**

6   **EXPERT IN THOSE SURVEY METHODS TO RENDER HER**

7   **OPINIONS REGARDING BAYESIAN HEDONIC REGRESSION**

8   Plaintiffs assert that Dr. Martin is not an expert with respect to conjoint

9   analysis or the direct method. However, Plaintiffs' objection should be disregarded

10 because it is a strawman, as Dr. Martin is not opining on the design or

11 implementation of conjoint analysis or the direct method. As Dr. Martin makes

12 clear in her declaration, she "was asked to evaluate whether the Bayesian hedonic

13 regression analysis proposed by Dr. Harris could be used in this matter to estimate

14 the difference between the price paid by NJOY consumers and the price they would

15 have paid absent the alleged misstatements and omissions regard the safety of

16 NJOY e-cigarettes." (Declaration of Denise Martin ("First Martin Decl."), Dkt.

17 263, ¶ 2, excerpts of which are attached as Ex. I to the Gale Decl.) As discussed in

18 Section 3 above, Dr. Martin is unquestionably qualified regarding regression

19 analysis and Bayesian methods to provide her opinions of whether the Bayesian

20 hedonic regression analysis Dr. Harris proposes could be used to measure damages

21 in this matter.

22

23 short-run can be considered fixed and because individual homeowners act as price
    takers who do not typically believe they can affect the equilibrium prices of houses

24 in the market. (Martin Responsive Decl., ¶ 11, n.21.) At a very macro level, the
    damages model approved in *In re ConAgra Foods, Inc.,* 90 F. Supp. 3d 919 (C.D.

25 Cal. 2015) ("*Conagra II*") could be considered to be a form of a Bayesian hedonic
    regression, because it brings outside information into a hedonic regression.

26 However, as discussed in NJOY's Motion to Strike the Supplemental Declaration

27 of Jeffrey E. Harris (Dkt. 255-1) (Gale Decl., Ex. J), the model proposed in

28 *Conagra II* is markedly different in many respects.

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1   To reiterate, a Bayesian hedonic regression uses outside information about

2   the value of an attribute in the regression, and that outside information could come

3   from a variety of sources. In order to evaluate whether the Bayesian hedonic

4   regression is applicable, Dr. Martin does not need to be an expert in how that

5   particular data was obtained. This is why Dr. Martin opines that Dr. Harris's

6   proposed Bayesian hedonic model will not work, even if Dr. Harris's conjoint

7   analysis could be performed and would be reliable. Moreover, Dr. Martin does not

8   need to an expert in the outside data source (*i.e.*, the conjoint survey) to opine that

9   the information from that data source cannot be properly incorporated into the

10   regression analysis. For example, Dr. Martin opines that Dr. Harris's proposal to

11   use a conjoint survey as outside information for the regression is problematic here,

12   because a hedonic regression looks at the marginal consumer, while a conjoint

13   study looks at the average consumer. (Gale Decl., Ex. I, First Martin Decl., Dkt.

14   263, ¶¶ 33-38.)

15   Dr. Martin is not opining on whether a conjoint study looks at the average

16   consumer, and instead, is relying on Dr. Van Liere's opinion (as well as the fact

17   that it is a generally accepted principle in that field), for her assumption that the

18   source of the outside information being incorporated into the regression is for the

19   average consumer. If that assumption, which is <u>undisputed,</u> is correct, Dr. Martin's

20   expertise in regression analysis provides her with a sufficient basis to opine that the

21   use of such data is problematic. (*See* Section 7.2, *infra*, for a further discussion

22   regarding the propriety of Dr. Martin relying on Dr. Van Liere.)

23   In total, Dr. Martin relies on Dr. Van Liere for three assumptions, all of

24   which are undisputed. The first assumption is that a conjoint analysis analyzes the

25   average consumer. The second assumption is that the valuations derived from a

26   conjoint analysis will be contemporaneous (whereas historical purchase prices are a

27   key input into a Bayesian hedonic regression). (First Martin Decl., ¶ 5(a).) The

28   third assumption is that the information derived from Dr. Harris's proposed model

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1 is unreliable (and unreliable data cannot be used to remedy the issues present in a

2 Bayesian hedonic regression).   (*Id*., ¶ 5(c).)

3   Ironically, if Plaintiffs' position were correct – that Dr. Martin could not

4 testify regarding Bayesian hedonic regression because she is not an expert in

5 conjoint analysis – then Dr. Harris similarly would have to be excluded for that

6 reason alone, because he has admitted that he is not a survey expert and would be

7 relying on others to design and implement the conjoint survey.

8 **7.**   **DR. MARTIN DOES NOT IMPERMISSIBLY RELY ON THE**

9   **OPINIONS OF DR. KENT VAN LIERE**

10   Plaintiffs assert that Dr. Martin cannot offer an opinion on how contingent

11 valuation fits into Dr. Harris's proposed Bayesian hedonic regression analysis,

12 because Dr. Martin impermissibly relies on the expert report of Dr. Kent Van Liere

13 for that opinion. (Obj., 5:21-23.) This argument fails for three reasons. First, Dr.

14 Martin's opinion that Bayesian hedonic regression cannot generate an estimate of

15 damages in this case is *independent* of Dr. Van Liere's testimony, a fact that

16 Plaintiffs fail to address or acknowledge. Second, Dr. Martin is simply relying on

17 Dr. Van Liere's opinions regarding conjoint analysis as an input into her more

18 complete analysis – she is not, as Plaintiffs suggest, simply parroting Dr. Van

19 Liere's opinion, or holding out the opinions regarding conjoint analysis as her own.

20 Third, the cases on which Plaintiffs rely in support of their assertion that

21 "piggybacking" is impermissible, are factually distinguishable from Dr. Martin's

22 conduct, and are simply inapplicable.

23   **7.1**   **Dr. Martin's Opinion That Bayesian Hedonic Regression Cannot**

24   **Generate an Estimate of Damages in This Case Is Independent of**

25   **Dr. Van Liere's Testimony**

26   Plaintiffs' Objection makes no reference to Dr. Martin's conclusion that Dr.

27 Harris's Bayesian hedonic regression will not and cannot generate an estimate of

28 damages as defined by this Court (*i.e.*, the difference between the price paid and the

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1 price that would have been paid absent the alleged misstatements and omissions).

2 (Martin Responsive Decl., ¶ 19.) That conclusion is completely independent of Dr.

3 Van Liere's opinions and testimony, rendering false Plaintiffs' assertion that "most

4 of Martin's opinions are, in fact, based on Van Liere's conclusions." (Obj., 9:22-

5 24.) Dr. Martin reaches this conclusion for two reasons. First, because of the

6 immature and unstable market conditions, Dr. Harris's method cannot yield a price

7 premium for any attribute, including the alleged "safety claim," a point that Dr.

8 Harris admits. (Reply Declaration of Dr. Jeffrey Harris in Support of Plaintiffs'

9 Motion for Class Certification ("Harris Reply Decl."), Dkt. 149-1, ¶¶ 29, 33,

10 excerpts of which are attached as Ex. K to the Gale Decl.) Even in his declaration

11 filed in support of Plaintiffs' amended motion for class certification (Dkt. 249-1),

12 Dr. Harris does not claim that he could use the results from conjoint analysis or

13 direct survey to address this fundamental problem. Second, as Dr. Harris

14 acknowledged in his deposition, Bayesian hedonic regression is not designed to

15 generate a "but for" price where market conditions would change. (Harris October

16 26, 2015 deposition ("Harris Second Dep.") at 131:9-16 and attached as Ex. E to

17 Gale Decl.; *see also*, Harris Reply Decl., Dkt. 149-1, ¶¶ 29, 33.) Accordingly, there

18 is no basis for Plaintiffs' assertion that Dr. Martin's opinion should be stricken

19 because she impermissibly relies on the opinions of Dr. Van Liere. (Martin

20 Responsive Decl., ¶ 19.)

21 **7.2 Dr. Martin Uses Dr. Van Liere's Opinion to Highlight the Failures**

22 **of Dr. Harris's Proposed Regression Analysis**

23 While Dr. Martin relies on Dr. Van Liere's opinions for issues relating to the

24 design and implementation of conjoint surveys, Dr. Martin is not reiterating those

25 opinions as her own. Further, Plaintiffs mischaracterize and overstate Dr. Martin's

26 reliance regarding those limited issues.

27 First, while Dr. Martin is not offering an opinion regarding Dr. Harris's

28 conjoint analysis and direct surveys, she has knowledge and experience regarding

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1   those techniques and knows exactly how they are used in a Bayesian hedonic

2   regression. (Martin Responsive Decl., ¶ 24.)

3   Second, Dr. Martin relies on Dr. Van Liere only to highlight the unreliability

4   of the conjoint analysis and direct survey methods, and the effect of that

5   unreliability on Dr. Harris's proposed regression. Dr. Harris conceded that the

6   hedonic regression analysis he proposes "may suffer from important limitations,"

7   including collinearity, omitted variable bias, and misspecification. (Supplemental

8   Declaration of Jeffrey E. Harris in Support of Plaintiffs' Motion for Class

9   Certification ("Harris Supp. Decl."), Dkt. 249-1, ¶¶ 20-37, excerpts of which are

10   attached as Ex. L to the Gale Decl.)[5] Dr. Harris claims that using the results of his

11   proposed conjoint analysis and direct survey as an input or "priors" to his hedonic

12   regression will allow him to mitigate the limitations he identified. (Gale Decl, Ex.

13   L, Harris Supp. Decl., Dkt. 249-1, at ¶¶ 33-36; Gale Decl, Ex. E, Harris Second

14   Dep. at 26:5-27:10.) Dr. Martin relies on Dr. Van Liere for the generally accepted

15   principles applicable to such surveys and to show the unreliability of the proposed

16   outside information (gleaned from the conjoint analysis and direct survey), which

17   she then uses to show additional reasons why Dr. Harris's proposed regression

18   analysis fails. (Martin Responsive Decl., ¶ 5.) In particular, Dr. Martin concludes

19   that Dr. Harris will be unable to resolve problems of collinearity in his hedonic

20   regression, because he will have no way to tether his conjoint results back to his

21   regression. Dr. Martin also concludes that Dr. Harris will be unable to resolve the

22   problems of collinearity, omitted variable bias, and misclassification in his hedonic

23   regression by bringing in unreliable estimates of the associated variables from a

24   conjoint analysis or direct survey. (*Id*. at ¶ 18.)

25

26   [5] As discussed in NJOY's Motion to Strike Dr. Harris's Supplemental
     Declaration, Dr. Harris previously testified that a hedonic regression could not be
27   performed with regard to e-cigarettes. (*See* Dkt. 255-1 at Section 4.2, excerpts of
     which are attached as Ex. J to the Gale Decl.)
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1   It is customary for experts to rely on the opinions of other experts in

2   formulating expert testimony and opinions. Every time an expert cites to an

3   accepted treatise, that expert is explicitly relying on the work or conclusions

4   reached by someone else. (*Id.* at ¶ 17.) Indeed, Dr. Harris's opinion is replete with

5   citations to the work and conclusions of others. Here, Dr. Martin is relying on

6   Dr. Van Liere – who has an M.A. and Ph.D. in Sociology and has been qualified as

7   an expert on conjoint analysis and direct surveys many times – with respect to

8   certain flaws in Dr. Harris's proposed conjoint analysis. (*Id.*)

9   Further, contrary to Plaintiffs' assertions, Dr. Martin is not reiterating Dr.

10 Van Liere's report. Instead, she is relying on Dr. Van Liere's conclusion that Dr.

11 Harris's conjoint survey is flawed as one part of her analysis of Dr. Harris's

12 proposed Bayesian hedonic regression. In other words, she is using Dr. Van Liere's

13 conclusions and then building on them to reach her own, independent

14 conclusions. That reliance is permissible and does not render her report

15 inadmissible. *See In re Toyota Motor Corp. Unintended Acceleration Mktg. Sales*

16 *Practices & Prods. Liab. Litig.,* 978 F. Supp. 2d 1053, 1078-79, 1082 (C.D. Cal.

17 2013) (holding that one expert may rely on the opinions of another admissible

18 expert to build on her testimony). Further, to the extent there are any questions

19 regarding the validity of Dr. Martin's reliance, those questions go to the weight of

20 her testimony, not its admissibility. *See Hynix Semiconductor Inc. v. Rambus Inc.,*

21 2008 U.S. Dist. LEXIS 123822, at *47 (N.D. Cal. Jan. 5, 2008) (holding that

22 argument regarding the viability of assumptions based on another expert's report go

23 to weight, not admissibility); *see also Toyota*, 978 F. Supp. 2d at 1072 n.20 ("Any

24 assumptions made by [the expert] may be challenged in cross-examination, as they

25 affect weight, not admissibility.").

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1   Accordingly, there is nothing impermissible about Dr. Martin's reliance on

2 Dr. Van Liere's conclusions here.[6]

3   **7.3   The Cases on Which Plaintiffs Rely Are Factually Distinguishable**

4   Finally, the cases on which Plaintiffs rely in support of their assertion that

5 "piggybacking" is impermissible are factually distinguishable from the present case

6 involving Dr. Martin. Each of those cases deals with an expert who is attempting to

7 put forward the opinion of a non-testifying expert as his or her own opinion, or

8 where an expert relies on inadmissible opinions. *See In re Conagra Foods, Inc.*, 90

9 F. Supp. 3d at 950 (finding the proffered expert's testimony regarding what various

10 surveys meant was inadmissible, because the expert relied on surveys conducted by

11 other experts not before the court); *J.B. Hunt Transp., Inc., v. General Motors*

12 *Corp.*, 243 F.3d 441, 444 (8th Cir. 2001) (finding the proffered expert's testimony

13 inadmissible because its relevance solely depended on the inadmissible testimony

14 of another testifying expert); *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d

15 609, 615 (7th Cir. 2002) (concluding that the sole testifying expert's testimony

16 "would have rested on air" without the testimony of other experts relied upon in the

17

18   [6] Furthermore, one expert's reliance on another does not render that expert's
testimony inadmissible. Instead, "[e]xpert opinions may find a basis in part 'on
19 what a different expert believes on the basis of expert knowledge not possessed by
20 the first expert.' Indeed, this is common in technical fields." *Toyota*, 978 F. Supp.
2d at 1066 (quoting *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 613
21 (7th Cir. 2002)). "For example, a physician may rely for a diagnosis on an x-ray
22 taken by a radiologist, even though the physician is not an expert in
radiology." *Id.* The *Toyota* court admitted the testimony of several experts whose
23 opinions were based, in part, on other experts' reports. *See Toyota*, 978 F. Supp. 2d
24 at 1082 (finding that, because one expert's testimony on a point was admissible, a
second expert may rely on that testimony "to the extent his opinions build on [the
25 first expert's] testimony"); *id.* at 1078-79 (same). The court in *Hynix* reached a
26 similar conclusion. There, the court held that an expert may properly rely on
assumptions that are based on other expert reports, and arguments regarding the
27 viability of those assumptions go to the weight of the testimony, not its
validity. 2008 U.S. Dist. LEXIS 123822, at *46-47.
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1   expert's report. Since those other experts were not before the court, the court

2   excluded the testimony); *In re TMI Litig.*, 193 F.3d 613, 716 (3d. Cir. 1999)

3   (affirming the district court's exclusion of an expert's testimony that heavily

4   depended on the inadmissible conclusions of other testifying experts); *Paramount*

5   *Media Group, Inc. v. Vill. of Bellwood*, 308 F.R.D. 162, 165 (N.D. Ill. 2015)

6   (excluding the testimony of Plaintiff's expert because he simply collected numbers

7   from various sources, handed them off to a non-testifying expert to conduct various

8   calculations, and then presented the conclusions as his own). That is simply not the

9   case here, as Dr. Martin does not attempt to parrot the opinions of any non-

10   testifying experts, and does not hold out the opinions of any other experts as her

11   own.

12   In reality, these cases apply to Plaintiffs' expert, Dr. Harris, who is actually

13   doing the exact thing Plaintiffs wrongly accuse NJOY's experts of doing. For

14   example, Dr. Harris, who admits he is <u>not</u> a survey expert, opines on survey

15   methodology and survey design based on his understanding from other non-

16   testifying experts who are not before the Court. (Gale Decl., Harris Second Dep.,

17   32:8-22.) NJOY and the Court are unable to examine those experts' credentials,

18   unable to analyze their purported opinions, and unable to question them. On the

19   other hand, NJOY has proffered two experts to opine on fields in which each is an

20   expert (survey methodology for Dr. Van Liere, and Bayesian and hedonic

21   regression analyses for Dr. Martin). Each is only opining in his or her field of

22   expertise. Moreover, both of NJOY's experts have submitted extensive

23   declarations and both have been deposed.

24   **8.   NEITHER NJOY NOR DR. MARTIN BEAR THE BURDEN TO SET**

25   **FORTH EVIDENCE REBUTTING DR. HARRIS'S OPINIONS**

26   Plaintiffs object to the opinions expressed in the Martin Declaration because

27   they "lack foundation" and "are not based on any supporting data or facts." (Obj.,

28   12:3-5.) Plaintiffs then assert that Dr. Martin's conclusions lack "a single piece of

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1   supporting evidence" (Obj., 12:6-7). These arguments demonstrate Plaintiffs'

2   misapprehension of the burden for rebuttal experts and misstates the record. Dr.

3   Harris was offered by Plaintiffs as their expert to attempt to satisfy Plaintiffs'

4   burden on their amended motion for class certification. By contrast, NJOY proffers

5   Dr. Martin solely as a *rebuttal* expert, and "[t]he function of rebuttal testimony is to

6   explain, repel, counteract or disprove evidence of the adverse party." *Clear-View*

7   *Techs., Inc. v. Rasnick*, 2015 U.S. Dist. LEXIS 72601, at *4 (N.D. Cal. June 3,

8   2015) (citation omitted). As a rebuttal expert, Dr. Martin is not required to put

9   forth evidence to affirmatively disprove each of Dr. Harris's opinions. *Id.* at *5

10 ("Although a defendant need not put forth expert opinions to challenge affirmative

11 theories on which the plaintiff bears the burden of proof, such as damages, a

12 defendant's rebuttal expert is limited to offering opinions rebutting and refuting the

13 theories set forth by plaintiff's expert(s)."). Here, Dr. Martin is not required to

14 affirmatively disprove <u>Dr. Harris's unsupported conclusions</u>; instead, as a rebuttal

15 expert, Dr. Martin's sole job is to identify the fundamental flaws in Dr. Harris's

16 opinions, which she has done.

17   Furthermore, NJOY responds to each of the enumerated conclusions in

18 Section IV of the Objection as follows:

19   1.   As set forth in great detail in Section 3 herein, Dr. Martin is eminently

20 qualified as an expert in Bayesian hedonic regression analysis and hedonic

21 regression analysis. Accordingly, her opinion that Bayesian hedonic regression

22 analysis "is not designed to provide an estimate of how supply or demand would

23 change in response to changes in the composition of product attributes available in

24 the market" is supported and appropriate. Moreover, in support of her opinion, Dr.

25 Martin referenced: coursework taken at Wellesley and Harvard that included

26 hedonic regression and Bayesian methods; Dr. Martin's own work at NERA with

27 regression analysis, including Bayesian regression, wage regressions, and stock

28 price regressions; the seminal article on hedonic regression, authored by Sherwin

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Rosen in 1974, which has been cited in thousands of articles since; an accepted textbook on econometric methods that includes a detailed review of hedonic regression; a chapter on Bayesian methods written by Dr. Kenneth Train, adjunct professor at U.C. Berkeley; and the testimony of Plaintiffs' expert, Dr. Harris, who agrees Bayesian hedonic analysis is not a tool that can estimate how demand and supply would have changed absent the alleged misstatements and omissions and that his approach will not yield a "but-for" price. (Martin Responsive Decl., ¶ 21.)

2.   Again, for the same reasons discussed in the preceding paragraph, Dr. Martin is qualified to state that hedonic regression fails because it cannot account for supply and demand decisions, and provides references to support her opinions.[7] Moreover, pursuant to the standard for rebuttal experts set forth in *Clear View*, Dr. Martin is not required to affirmatively disprove Dr. Harris's opinions; instead, she is identifying material flaws. Further, as Dr. Martin noted, this point is conceded by Plaintiffs' own expert, Dr. Harris. Lastly, Plaintiffs' argument that an article relied on by their own expert from 1974, is clearly improper (and illogical).

3.   The credibility of the percipient witnesses on which Dr. Martin relies is purely a question regarding the weight of Dr. Martin's testimony; it has nothing to do with her qualifications and whether she meets the standard set forth in *Daubert*. Further, Plaintiffs have not put forward any evidence to demonstrate that the witnesses were "interested," or that the only information in the record on these issues is incorrect. In addition, Dr. Martin only relied on certain facts provided by the witnesses' testimony as an input to her analysis, and not as the sole basis for her conclusions. (*Id.* at ¶ 22.) Dr. Harris acknowledges that his conjoint analysis and direct survey will yield, at best, current estimates of the willingness to pay for the alleged "safety claim," and the only testimony in the record is that the market was

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[7] While Plaintiffs cite to Paragraph 10 from Dr. Martin's declaration, the quoted phrase is not found in that paragraph.

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1   changing over the alleged class period as there was entry and exit of manufacturers,

2   changes in product attributes, and changes in the mix of information available in the

3   market regarding e-cigarettes. There is no requirement that Dr. Martin conduct

4   independent research to confirm facts in the record. Lastly, it is common practice

5   for experts to rely on facts or assumptions when providing their expert opinions.

6   4.   Again, pursuant to the standard set forth in *Clear View* for rebuttal

7   experts, Dr. Martin is not required to put forth evidence disproving Dr. Harris's

8   opinions. Instead, she has simply identified – based on her extensive experience – a

9   flaw that will preclude Dr. Harris from constructing his proposed damages model.

10   Even though nothing more is required, Dr. Martin cited to prior litigation where

11   experts were unable to obtain such data, and Dr. Martin testified that NERA

12   reached out to the organizations at issue in an attempt to get the required data, but

13   were rebuffed, because those organizations do not provide data for litigation

14   purposes. Lastly, it is Dr. Martin's opinion that even if Dr. Harris is able to obtain

15   data from an outside agency, such new information will not yield historical data for

16   Dr. Harris's proposed conjoint analysis – thus making his proposed model

17   unreliable. (*Id*. at ¶ 23.)

18   5.   As discussed in Section 3, Dr. Martin is well qualified to provide her

19   opinions that Dr. Harris's proposed Bayesian hedonic model will not yield the

20   proper method of damages, is unreliable, and cannot be performed under generally

21   accepted principles. As an expert in regression analysis, Dr. Martin is qualified to

22   opine that one cannot use outside information from a source dealing with average

23   consumers to a regression that is using a dataset for marginal consumers, and that

24   the results of a conjoint analysis cannot be tethered to market price via inclusion in

25   hedonic regression.

26   **9.   CONCLUSION**

27   For the reasons set forth herein, Plaintiffs Objection/Motion to Strike should

28   be overruled/denied.

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1   Dated: January 8, 2016   Respectfully submitted,

2   TROUTMAN SANDERS LLP

3

4   By: /s/ Paul L. Gale
                                                     Paul L. Gale
5
                                                Attorneys for Defendants
6   NJOY, Inc. and SOTERRA, INC.

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